In the Supreme Court of Vermont—General Term, Nov., 1861.

BRIDGMAN *vs.* HOPKINS.[1]

In an action of slander, charging the defendant with having accused the plaintiff of the commission of the crime of adultery, it is competent for the defendant, in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious.

This was an action of slander for charging the plaintiff, an unmarried man, with having had illicit intercourse with a married woman, and thereby committed the crime of adultery.

On the trial by jury in the County Court, exceptions were taken to the admission of evidence offered in mitigation of damages, that before the speaking of the words, the plaintiff's general character and reputation in the community for chastity was bad; and that he was generally reputed in the community to be an unchaste and licentious man.

(Several other exceptions were taken, but not being of much general interest, they are omitted in the present report of the case.)

J. A. Wing, Counsel for plaintiff.

B. N. Davis, Counsel for defendant.

The opinion of the Court was delivered by

BARRETT, J.—It is claimed upon the above exceptions that the evidence was improperly admitted, for the reason, that while the alleged slander consisted in charging the plaintiff with having committed the crime of adultery, the evidence of character was not restricted to general character, in reference to the technical kind and legal quality of the act charged, which rendered the words slanderous and actionable. In other words, it is claimed that no evidence as to character was admissible, except such as tended to show that the plaintiff's general character was bad in reference to the *crime* of adultery. We think the exception is not well founded. It is uniformly held, that, in this kind of action, the plaintiff puts

[1] We are indebted to the courtesy of Mr. Justice Barrett for the following opinion, for which he will accept our thanks.—*Eds. A. L. Reg.*

in issue his character, so far as the amount of damage is concerned, in reference to the subject whereof the alleged slander is predicated. The act of such intercourse, as the words charged in this case, is made a crime, and is visited with an ignominious punishment by provision of statute, contrary both to the common and ecclesiastical law: 4 Bl. Com. 65.

Undoubtedly, it is this provision of the statute that makes the words actionable *per se*. Without that provision, words charging illicit intercourse with a married woman would have no different effect, as constituting a cause of action, from words charging such intercourse with an unmarried woman. The act, in its moral and conventional character, would be the same in both cases, and would have the same bearing upon the character, moral and social, of the person committing it. The practice of such acts is *licentiousness*, and the character induced thereby is that of an unchaste and licentious man, as much so, certainly, when they are practised with *married* as unmarried women. This result is as much involved in acts, which, under the statute, are visited with penalty as a crime, as in the same kind of acts to which such penalty is not attached. When, therefore, a plaintiff comes into Court, for the reparation of the injury brought to his character by the slander alleged in this case, we think that, as the act charged necessarily involves a specific moral and social debasement, irrespective of the final consequences imposed by the statute, he comes with his character as affected morally and socially by such debasement, when it has become matter of general reputation, whether produced by his habit of licentious conduct with married or unmarried women. It would seem to present to the general sense of the community a strange incongruity, to hold that the character of a confirmed and notorious debauchee is susceptible of injury to the same extent, by the charge of a specific act of illicit intercourse with a married woman, as that of a man unclouded by any suspicion of licentious conduct, unless such character as a debauchee should be shown to exist with reference exclusively to the practice of illicit intercourse with married women; and the incongruity would be rendered the more

palpable, if it were to be held that it would require, on this ground, the same amount of pecuniary remuneration to repair the damage to the character of the debauchee reprobate, as to that of the unsuspected chaste man.

Change the state of the case, by supposing that the plaintiff, being unmarried, by a course of licentious conduct towards *unmarried* females, had acquired a general character as a licentious debauchee. Having such a character, should he get married, and soon thereafter be charged with an act of illicit intercourse with an *unmarried* female—the same kind of act with the same quality of subject, by practising which, before marriage, he had acquired his character, and which, while he was unmarried was not criminal under the statute, it would present a rare absurdity to hold, that the fact of his marriage had so obliterated his existing character up to that time, and had so renovated and purified him, as to place him in the same category of immunity as the man whose life had ever been an ensample of purity and chastity; and the absurdity would be strongly illustrated, if he should have fallen into wedlock with a female as debauched as himself—an event likely enough to happen—and would equally involve the application of the rule claimed by the plaintiff in this case.

It seems clear, that the application of the established rule of law on this subject cannot be made to depend upon the accidental circumstance, that either party to the alleged act of illicit intercourse was married, and, by virtue of that circumstance, exclude evidence of the general character of the plaintiff for licentiousness, existing at the time the words were spoken, when such evidence is offered to affect the amount of damages which he should properly recover.

This view, in our apprehension, stands upon reasons that fully justify it, without the support of adjudged cases. Yet, as sustaining it, the case of *Stone* vs. *Varney*, 7 Met. Rep. 86, and of *Bowen* vs. *Hall*, 20 Vt. Rep. 232, may be referred to.

Judgment affirmed.

The foregoing case incidentally involves a question which, first and last, and in different forms, has occupied the time, and tasked the energy of Courts to a greater extent, than any inherent difficulty of principle involved, would seem to justify us in expecting. We mean the general question of the admissibility of evidence of plaintiff's character in actions of libel and slander. That such evidence is admissible in certain cases, we regard as fully settled, notwithstanding the exceptional cases to the contrary.

1. Where the defendant justifies words, spoken or written, which impute crime to the plaintiff, by alleging the truth of such charge, he is bound to adduce the same kind of proof, and many of the cases say, the same degree of proof, which would be required to convict the plaintiff of the offence. And the plaintiff, on his part, is allowed to encounter this evidence in the same way he would be, if he were on trial for the crime. One of these modes, where the direct evidence leaves the case doubtful, (as most cases are, more or less,) is by proof of *good* character in regard to the general nature and subject-matter of the offence charged: Harding *vs.* Brooks, 5 Pick. R. 244; 3 Greenl. Ev. § 25, 26, and note. And this evidence the plaintiff may adduce in reply to the defendant's evidence directly tending to prove him guilty of the crime, and before any attack is made upon his general character. And the English courts have gone so far as to hold, that if one on trial for a crime omit to give evidence of general good character in regard to the subject-matter of the offence, when he might do so, it affords just ground of comment to the jury, in behalf of the prosecutor.

It may be questionable, we think, how far the American courts would adopt this view; but the rule of the general admissibility of evidence of good character on the part of the accused, is universally recognised here, and there can be no doubt of its applicability in actions of libel and slander, where the defence implies a charge of crime.

2. There can, we think, be no fair ground to question that it is competent for the defendant also to give general evidence of plaintiff's *bad* reputation in regard to the particular subject-matter of the charge contained in the words spoken or published. There has been a good deal of conflict in the decisions upon this point, and the rule in this country, in one particular, differs from that which prevails in the English courts. But most of this conflict and apparent confusion among the decided cases, may be dissipated by keeping carefully in mind the proper grounds for the admissibility of this kind of evidence.

The main ground upon which it seems to us such evidence *ought* to be received, is, that it tends to rebut malice in the defendant. And here, it seems to us, that the English cases, where evidence has been received to show that the plaintiff, before the alleged slander, was generally reputed to be guilty of the particular offence or misconduct charged, is more pertinent to the question of damages, than general reputation that he had been guilty of *similar* miscarriages, but not the *same*. It is, perhaps, a difference in degree, rather than in kind; but if the former is admissible, then it follows, as it seems to us, *a fortiori*, that the latter must be. And this will be the result, whether we view it in the light of rebutting malice in the defendant, or of affording the plaintiff only such damages as he has sustained.

It is obvious, in the majority of actions for defamation, the measure of damages is far more seriously affected by the degree of malice on the part of the de-

fendant, than by the positive amount of injury or damages suffered by the plaintiff. And there are many instances where the attempt at defamation on the part of a malicious defendant, has produced a positive reaction in favor of the plaintiff, whereby his reputation is raised to a higher and far more enviable point, than if it had not been assailed, and thus a positive accession of credit comes from the very misconduct of the defendant. This, nevertheless, is no excuse in law, and generally produces no abatement in the damages awarded by the jury, provided the conduct of the defendant has been wholly without apology or excuse, and in its nature wanton and wicked. Calloway *vs.* Middleton, 2 A. K. Marsh, 372.

Hence it is apparent that that is far more effective evidence on the part of the defendant, which presents an excuse or occasion for him to have acted, through imprudence and want of consideration, by giving too hasty credence to flying rumor, or general opinion, without testing its foundation; than that which shows that the plaintiff has suffered but slight damages, in fact, in consequence of his former bad reputation upon the same point.

And it is by no means certain that persons of a dubious reputation upon a given subject suffer less, in consequence of a distinct false charge, from a reputable source upon the very point where they were before a little tender, than would another whose reputation is entirely unquestioned in regard to it. Our own observation would lead us to the contrary conclusion; and, therefore, we should say that the chief benefit derivable from evidence of this character on the part of the defendant must be sought in its effect in rebutting malice. And there can be no question it would be most effectual in this way if accompanied with probable proof of good faith and sincerity on the part of defendant in giving currency to the accusation, which would be a very natural inference from the general belief of the public upon the point, unless there was evidence of special evil intent on the part of the defendant. And it is unquestionable, that the effect of this general evidence of bad repute on the part of plaintiff, would be more efficient in rebutting all presumption of malice on the part of the defendant, where it went to the very act of which he was led to accuse the plaintiff. And this is precisely the class of evidence which the English courts have generally held admissible: Earl of Leicester *vs.* Walter, 2 Campb. 251; ——— *vs.* Moor, 1 M. & S. 284.[1]

The question is made in some of the English cases whether the same rule of evidence will apply where the defendant pleads in justification the truth of the words with the general issue. Snowdon *vs.* Smith, in note to 1 M. & S. 286. So, too, many of the American cases have rejected general evidence of bad reputa-

[1] If the question of damages in actions of slander were to turn mainly upon the actual injury done to the plaintiff, it might be competent for the defendant to reduce the amount of the recovery, by showing his own bad reputation for truth, and the good reputation of the plaintiff upon the subject of the accusation, whereby it would naturally happen that the accusation would fail to gain any degree of credit, and consequently to damage the plaintiff to any great extent. But it is notorious that, in actions for defamation, the positive injury suffered by the plaintiff is one of the last and least of the ingredients which go to make up the damages awarded

tion on the part of plaintiff, in consequence of defendant having plead in justification. Root *vs.* King, 7 Cow. R. 613; Paddock *vs.* Salisbury, 2 Cow. R. 811. But it is obvious that upon principle there can be nothing in any such dictinction. It goes upon the assumption that such evidence will improperly prejudice the finding of the jury upon the other issue in the case. But such an objection lies equally in all cases of jury trials where there are different issues, which is almost, of necessity, always the case. A proper respect for and confidence in the competency and impartiality of jurors to discriminate in regard to the different issues before them, and make the requisite application of the evidence to them, would remove all objection upon this ground. Hence, in the majority of the best considered cases, this objection has been regarded as having no foundation in reason or principle. If the evidence is competent to be received, upon any issue, it remains competent so long as that issue remains to be tried, whatever other issues may also be for trial at the same time. Stone *vs.* Varney, 7 Met. R. 86; Vick *vs.* Whitfield, 2 Hayw. 222; Calloway *vs.* Middleton, supra; Sawyer *vs.* Hopkins, 9 Shepley, 268; Henry *vs.* Norwood, 4 Watts, 347; Lamos *vs.* Snell, 6 N. H. R. 443; Bowen *vs.* Hall, 20 Vt. R. 232, and cases there cited by Davis, J.

The only leading case which has called the general doctrine of the admissibility of such evidence in question, is that of Jones *vs.* Stevens, 11 Price, 235–283. This is, on many accounts, a remarkable case.

1. The evidence was offered upon false grounds, and was, of course, rejected upon false grounds, so that, while the reasoning of the judges is all unobjectionable in the main, the decision is altogether erroneous. The evidence was offered to contradict the prefatory averments in the declaration, that the plaintiff has always sustained a good character, and also to establish a general plea that he had been guilty of dishonorable practices as an attorney, without specifying the particular facts relied upon. The Court held, very properly, that such a plea was bad, and made a most wonderful flourish of rhetoric in denunciation of such a mode of pleading, which was all unnecessary, since the decided cases sufficiently condemned it. J'Anson *vs.* Stuart, 1 T. R. 748; S. C. 2 Smith, L. C. 30, and cases cited in notes, both English and American.

2. The judges go out of their way to argue the absurdity of receiving evidence upon the ground of contradicting the mere inducements of the declaration, without seeming to comprehend that there were any other grounds upon which it could be received.

3. To complete the climax of judicial eccentricity, the Chief Baron rises in his seat upon the bench, and, addressing himself to the aged Baron, Wood, who had just pronounced an opinion, more wordy than wise, and far more rhetorical than sound: "Upon the unimpaired vigor of intellect, and unabated learning which he had evinced in the discharge of his high duties:" and expressed the thanks of the Court "for the very effective and decisive part he had taken in the determination of the important questions" involved.

And all this scenic exhibition is made in an English court of law, upon occasion of the decision of an inferior tribunal, against all the former decision of coordinate courts, and all the analogies to be derived from principle and reason—a decision which has never been followed to any extent, either in England or America. The case seems to have excited very unusual interest at the time, and was

argued by the most distinguished of the English bar of that day—such men as Brougham, Bayley, Jervis, and Taunton. It was an action for libel upon an attorney in his professional capacity. The case, for some reason, seems to have attracted a share of interest, both at the bar and upon the bench, quite out of proportion to the importance of any legal question involved, and, as is not uncommon in such cases, probably received a wrong bias on that account, by which a just result may have been reached in the particular case, but quite at the expense of proper adherence to legal rules and principles. The only English case which we have noticed following this lead is the N. P., one of Bracegirdle *vs.* Bailey, 1 F. & F. 536, and we have no belief that it will finally prevail in the Court of last resort.

There are many analogies in the law of libel and slander which lead us to conclude that the English rule first stated is the true one.

Any evidence tending to show that the plaintiff was liable to suspicion of being guilty of the offence, short of a full justification, may be given in evidence in mitigation of damages.

So, too, where the defendant only repeated what he heard from another, giving the name of the author at the time, it may always be received to lessen damages; and most of the cases hold it a full justification of merely verbal slander, inasmuch as it adds nothing to the force of the accusation to repeat it in that mode, and when done in good faith should involve no actionable responsibility. McPherson *vs.* Daniels, 10 B. & Cr. 263. The resolutions in Lord Northampton's case, 12 Co. R. 134, are here regarded as qualified in the important particular, that to justify the repetition of verbal slander invented by another, it is requisite to allege and prove that defendant did it in good faith, believing it to be true. Tindal, Ch. J., in Ward *vs.* Weeks, 7 Bing. R. 211. See, also, upon the questions discussed, Starkie on Slander, 213, and cases cited by the American editor; see, also, Tidman *vs.* Ainslie, 28 Eng. L. & Eq. R. 567; Woolmer *vs.* Latimer, 1 Jur. 119; Duncombe *vs.* Daniell, 2 Jur. 32.

In regard to the particular form of the question involved in the principal case, and the decision made by the court, there is no reasonable ground of doubt except upon the basis of the English rule requiring proof of plaintiff being guilty of the very offence. One might feel surprise at the refinement of the distinction attempted, in this case, by the counsel, as indicated by the opinion of the court, if there were not too much ground to admit that such refinements sometimes find favor with courts, so that the duty of counsel to his client requires him to urge every plausible argument in favor of his cause, without much regard to its probable fate with the Court.

I. F. R.